involved. Hence it is believed that a refusal to accord the protection sought would do more than anything else to discourage legitimate and desirable enterprise in news collection and dissemination.

It is interesting to note that Mr. Justice Brandeis shares the illusion of probably the majority of the legal profession that by such a refusal to give the plaintiff the relief he asked (the problem presented being admitted to be a new one) the court would avoid making "a new rule of law."[13] This of course is not true. It is usually overlooked—indeed at times it is denied[14]—that in settling that under a given state of facts the person involved is privileged to act in a certain way, a court determines the jural relations of that person to other human beings. Those who deny that a privilege is a jural relation would, if they were logical, have to say that a decision for the defendant in the principal case would involve a determination of a mere question of fact and not of the jural relations of the parties. Surely, this cannot be so. When courts determine that certain facts give a witness a privilege not to testify, or that certain other facts make defamatory remarks about one's neighbor "privileged" and so not actionable, they are determining the jural relations of the parties, just as much as if they were to find against the privileges claimed and thereby to recognize the existence of rights. Whichever way a new problem is decided, therefore, the court establishes for the first time what legal relations result from the state of facts in question. If the decision is for the plaintiff, a *right* and correlative *duty* are recognized; if the defendant wins, his *privilege* and the correlative *no-right* of the plaintiff are recognized. So Mr. Justice Brandeis, in holding that the defendant was *privileged* to pirate the plaintiff's news, was laying down "a new rule of law" just as clearly as was the majority when they held that the defendant was *not privileged.*

W. W. C.

REVOCATION OF LICENSES WITHOUT A HEARING

The line of demarcation between the police power and the limitation of the fourteenth amendment is continually moving in the direction of a wider extension of the police power with a concomitant retreat and weakening of the restraining force of the fourteenth amendment.[1] In specific application to the regulation of occupations, this movement is marked by an ever growing social control over private enterprise and in a subjection to license of many occupations hitherto considered

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[13] See the passage quoted in the preceding note.

[14] Sir Frederick Pollock seems to do so in his volume on *Jurisprudence* (2d ed., 1904) 62. The passage is quoted and criticized by Professor Hohfeld in (1913) 23 YALE LAW JOURNAL, 16, 42.

[1] See *Bunting v. Oregon* (1917) 243 U. S. 426, 37 Sup. Ct. 435.

free from any public interest or need of restraint for the public welfare.[2] Yet, while allowing wide discretion to the legislature in its conclusion that a particular industry or occupation requires public regulation, the courts, in the exercise of judicial control, will test the constitutionality of a statutory or administrative regulation by its tendency to accomplish a legitimate governmental purpose or its "reasonableness" in the adaptation of means to ends. Thus, in recent years, numerous regulations of particular occupations have been held unconstitutional, for example, arbitrary or inappropriate tests to determine fitness for the occupation of railroad conductor[3] or undertaker[4] and a requirement of licenses or license fees from horseshoers,[5] cement contractors,[6] laundrymen,[7] owners of dancing schools,[8] department stores,[9] etc.

It is in the administration of regulations for the grant and revocation of occupational licenses that confusion in the law is to be found. Two lines of decision may be noted. In the one, it is held that the legislature may not constitutionally confide to the unregulated discretion, even though honestly exercised, of an administrative officer, the grant or refusal of a license to engage in an occupation which, without a license, would be illegal. These decisions rest on various grounds, either on the unconstitutional delegation of legislative power, on alleged looseness amounting to unreasonableness, or an administrative opportunity for arbitrary discrimination.[10] The other line of decisions finds no infringement of the fourteenth amendment in the grant of a complete discretion, honestly exercised, to administrative license authorities, a view which has the support of the United States Supreme Court,[11] and is generally sustained on the theory that the legislative power to prohibit involves the power to permit on conditions deemed appropriate. Freund's suggestion that the difference in the decisions follows the distinction between occupations subject to regulation and those subject to prohibition, while not fully satisfactory as a test, is

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[2] For a list of such occupations, see 17 R. C. L. 548.

[3] *Smith v. Texas* (1914) 233 U. S. 630, 34 Sup. Ct. 681.

[4] *People v. Harrison* (1915, N. Y.) 170 App. Div. 802, 156 N. Y. Supp. 679; *People v. Ringe* (1910) 197 N. Y. 143, 90 N. E. 451.

[5] *In re Aubrey* (1904) 36 Wash. 308, 78 Pac. 900; *Bessette v. People* (1901) 193 Ill. 334, 62 N. E. 215.

[6] *State ex rel. Sampson v. City of Sheridan* (1918, Wyo.) 170 Pac. 1.

[7] *Ex parte Sing Lee* (1892) 96 Cal. 354, 31 Pac. 245.

[8] *People v. Wilber* (1910) 198 N. Y. 1, 90 N. E. 1140.

[9] *State v. Ashbrook* (1900) 154 Mo. 375, 55 S. W. 627.

[10] See Freund, *Police Power,* sec. 643 and cases there cited.

[11] *Commonwealth v. Davis* (1895) 162 Mass. 510, 39 N. E. 113; *Davis v. Massachusetts* (1897) 167 U. S. 43, 17 Sup. Ct. 731; *Wilson v. Eureka City* (1899) 173 U. S. 32, 19 Sup. Ct. 317; *People ex rel. Lieberman v. Van de Carr* (1905) 199 U. S. 552, 26 Sup. Ct. 144.

the only one that seems to present reasonable success in reconciling conflicting decisions.[12]

It is when we come to the consideration of due process in the revocation of licenses that serious confusion is found to prevail. An occupational license, according to a preponderance of judicial opinion, constitutes only a privilege and not a right,[13] or property,[14] or a contract between the State and the licensee.[15] It is in its nature revocable.[16] The question therefore arises whether the license may be revoked without notice and an opportunity for a hearing given to the licensee. It is conceded that the power to revoke may, without violating due process, be conferred upon administrative officers, and does not require judicial proceedings.[17] But in determining under what circumstances notice and hearing are required, the courts appear to have no guiding test or principle. On the whole, it may be said that when a statute or ordinance has expressly given power to revoke without notice or hearing the courts have sustained the statute or ordinance. But inasmuch as these enactments usually involve liquor licenses, the decisions are sustainable on the ground that the business is a harmful one which the State might entirely prohibit, and a license may therefore be granted on any conditions deemed appropriate, including its withdrawal without notice. The "implied assent"[18] of the licensee to this condition is assumed by the courts.[19] On the other hand, and clearly distinguishable, there is a group of various occupations, such as those of physicians, lawyers and architects, requiring special study

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[12] Freund, *op. cit.*, 670.

[13] *Dist. of Columbia v. Lee* (1910, D. C.) 35 App. Cas. 341.

[14] *Littleton v. Burgess* (1905) 2 Wyo. 173, 82 Pac. 864. But see *Lowell v. Archambault* (1905) 189 Mass. 70, 75 N. E. 65; and *People v. Flynn* (1905, N. Y.) 110 App. Div. 279, 96 N. Y. Supp. 655, aff. 184 N. Y. 579, 77 N. E. 1194.

[15] *Union Pass. R. Co. v. Philadelphia* (1879) 101 U. S. 528; *Wiggins Ferry Co. v. East St. Louis* (1882) 107 U. S. 365, 2 Sup. Ct. 257.

[16] *Doyle v. Continental Ins. Co.* (1876) 94 U. S. 535, 540. In private law there is still much confusion as to the circumstances under which a license becomes irrevocable. See *Hurst v. Picture Theatres, Ltd.* (C. A.) [1915] 1 K. B. 1, overruling *Wood v. Leadbitter* (1845, Exch.) 13 M. & W. 838, and note in (1915) 13 MICH. L. REV. 401; *Phillips v. Cutler* (1915) 89 Vt. 233, 95 Atl. 487. But see as to irrevocability of a license to build granted under the police power, *Lowell v. Archambault, supra,* note 14.

[17] *People v. Apfelbaum* (1911) 251 Ill. 18, 95 N. W. 995; *Meffert v. Packer* (1903) 66 Kan. 710, 72 Pac. 247, aff. 195 U. S. 625, 25 Sup. Ct. 790.

[18] The "implied assent" is, as a matter of fact, non-existent. Justice Holmes in the recent case of *Union Pacific R. R. Co. v. Public Service Commission of Missouri,* decided Dec. 9, 1918, 39 Sup. Ct. 24, points out that "it always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress."

[19] *Wallace v. Reno* (1903) 27 Nev. 71, 73 Pac. 528, reviewing the decisions. See also *Commonwealth v. Kinsley* (1882) 133 Mass. 578, an analogous business, keeping a pool table for hire.

and training, a license for which cannot be withdrawn without fair notice or hearing.[20] Intermediate between the noxious occupations and those requiring long and special training are a third class of essentially useful occupations, such as those of auctioneers, hackmen, milk dealers, dairymen, laundrymen, etc. The law or ordinance requiring a license for such occupations often provides that the license is revocable; its revocation to follow, like its grant, at the discretion of the licensing authority, or on violation of statutes or ordinances, without either providing for or excluding notice and a hearing. It is here that particular confusion prevails both in the decisions of the courts and in their reasons, arising largely from their propensity to cite authority from one or other of the groups above mentioned, without due examination of the essential differences between the three groups and the principles which should govern them. Where, in this third class, grant and revocation are discretionary, most courts justify a discretionary revocation on the "implied assent" of the licensee, and apparently dismiss the consideration that the status of a person who opens and conducts a business after license granted is different from that of one not yet in the business;[21] other courts, a small minority, regard the expense incurred by the licensee as a moral justification for according him notice and a hearing before revoking his license.[22] The New York courts justify the withdrawal without a hearing of a license for the sale of articles likely to injure the public health, on the ground that it is an administrative and not a judicial proceeding and therefore requires no hearing—not a very plausible ground—and assert that the licensee has a remedy by *mandamus* against arbitrary or oppressive exercise of the power.[23] A better ground would seem to be the public emergency requiring prompt action. But where the statute authorizes the revocation of a license as a penalty for violation of statutory provisions, and no existing emergency requires immediate action, it would seem contrary to established notions of due process to deny notice and

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[20] *Meffert v. Packer, supra* (physician); *Reetz v. Michigan* (1902) 188 U. S. 505, 23 Sup. Ct. 390 (physician); *Ex parte Robinson* (1873, U. S.) 19 Wall. 505 (attorney-at-law); *Klafter v. State Board of Architects' Examiners* (1914) 259 Ill. 15, 102 N. E. 193 (architect).

[21] *Child v. Bemus* (1891) 17 R. I. 230, 21 Atl. 539 (hackman; the court, however, expressing its preference for notice and hearing procedure); *Wiggins v. City of Chicago* (1873) 68 Ill. 373 (auctioneer); *Edelstein v. Bell* (1915, N. Y. Sup. Ct., Spec. T.) 91 Misc. 620, 155 N. Y. Supp. 590 (motion-picture theatre); *Stone v. Fritts* (1907) 169 Ind. 361, 82 N. E. 792 (school teacher).

[22] *Peginis v. City of Atlanta* (1909) 132 Ga. 302, 63 S. W. 857 (restaurant). In New York and New Jersey, this has been held to extend even to liquor licenses. *In re Cullinan* (1904, N. Y.) 94 App. Div. 445, 88 N. Y. Supp. 164; *State, Lambert, Prosecutor v. Rahway* (1896, Sup. Ct.) 58 N. J. L. 578, 34 Atl. 5.

[23] *People ex rel. Lodes v. Dept. of Health* (1907) 189 N. Y. 187, 82 N. E. 187. See also *State ex rel. Nowotny v. City of Milwaukee* (1909) 140 Wis. 38, 121 N. E. 658.

a hearing to a person charged with such offense.[24] The recent case in North Dakota[25] which construed a statute authorizing a Dairy Commissioner to revoke the license of the owner of a creamery "on conviction" or "on evidence" of the misreading of a cream test as permitting the revocation of the license on the *ex parte* report of an inspector, without notice or hearing to the licensee, seems therefore contrary to principles of due process.

E. M. B.

SOME EFFECTS OF A PARTIAL ASSIGNMENT OF A CHOSE IN ACTION

It has been said that "the partial assignee of a chose in action acquires no rights at common law."[1] Doubtless in making this statement Dean Ames had in mind the relation of the partial assignee to the debtor. Thus interpreted his statement is for most jurisdictions a correct statement of the law, although, as the present writer has elsewhere pointed out,[2] there are states in America in which assignees may enforce their claims against the debtor in "courts of law."[3] If, however, we examine the relations between the partial assignee and his assignor, we discover the need of limiting or at least explaining Dean Ames's statement. It seems clear that a partial assignment fairly implies an agreement in fact by the assignor to refrain from collecting from the debtor the portion assigned. If so, obviously the common law may attach to this agreement a contractual duty. The cases so hold.[4] As against the assignor, therefore, the partial assignee

[24] *People ex rel. Loughran v. Flynn* (1905, N. Y.) 110 App. Div. 279, 96 N. Y. Supp. 655 and cases there cited. Even the existence of an emergency would seem, properly, to justify only summary *suspension* of the license until a hearing had been had.

[25] *Cofman v. Osterhous* (1918, N. Dak.) 168 N. W. 826. Nor is the conclusion altered by the fact that the licensee requested and obtained a hearing from an officer having no authority to review the ruling of the authorized officer.

[1] Ames, *Cases on Trusts* (2d ed.) 63.

[2] (1917) 30 HARV. L. REV. 482.

[3] In a code state like New York, or any state in which "common law" and "equity" are administered by the same tribunals, the term "court of law" can mean nothing more than the tribunal sitting with a jury in cases which, before the consolidation of law and equity, were heard in "common law courts"; and "court of equity" can mean nothing but the same tribunal sitting without a jury for the hearing of cases formerly cognizable in Chancery in the exercise of its "equitable" jurisdiction. The absence of a jury in the "equity" cases has the farther result that the appellate tribunal reviews the findings of fact of the "equity court" in a manner different from that in which it examines a jury's verdict. So long, however, as by constitution or statute we insist that the facts in all cases which historically were "common law" cases shall be found by a jury, and in all "equity cases" by the judge, we shall preserve that relativity of law which the consolidation of the two courts sought to abolish.

[4] *Eaton v. Mellus* (1856, Mass.) 7 Gray, 567; *Hubbard v. Prather* (1808, Ky.) 1 Bibb. 178; 5 C. J. 968, n. 56.